THE JUDICIARY ACT OF 1801

In the second session of the Sixth Congress, during the closing months of John Adams's administration, an act was passed, known as the Circuit Court Act or the Judiciary Act of 1801, which considerably increased the Federal judicial establishment of the United States.[1] President Adams and the Federalist party have been very generally condemned for passing this measure, on the ground that such an enlargement of the judiciary was entirely unwarranted by the actual needs of the country and was only effected for the purpose of keeping the Federalists in control of the judiciary for a long time to come, and Adams was most severely censured for his appointments to office under the act, partly because of the character of the appointments, and partly because some of them were rushed through in the last moments of his term of office, and hence were commonly stigmatized as "midnight appointments." Without taking either one side or the other of the question as to whether this judicial reorganization was a necessary or even desirable reform, or as to whether Adams is to be so severely criticized for the appointments which he made, inasmuch as many of the assertions that are commonly put forward in reference to these points are either absolutely incorrect or are so loose and general as to be very misleading, it may be serviceable to give a correct statement of some of the facts in the case, which will be of assistance in reaching a final and just conclusion on the whole matter.

In the first place, the judiciary act of 1801 was not adopted solely because the recent presidential election had gone against the Federalists. The greatest change that was made in the judicial system by this act was a reorganization of the circuit courts, and this was a reform that had been agitated from the very establishment of these courts. The original act of 1789 had ordered that the circuit courts should be held by two justices of the Supreme Court of the United States.[2] Almost immediately the members of that court had protested,[3] and as early as 1790 the Attorney-General (Edmund Randolph) had reported against this practice.[4] In 1793

[1] Act of February 13, 1801.

[2] Act of September 24, 1789.

[3] *American State Papers, Miscellaneous*, I. 52.

[4] *Ibid.*, p. 23.

it was provided that one justice of the Supreme Court should be sufficient for the holding of circuit courts ;[1] but even this relief was not adequate and complaints were still made from various quarters. Some sort of revision of the system was recommended from time to time, and in his speech at the opening of the first session of the Sixth Congress in 1799, the President insisted upon such "a revision and amendment" as "indispensably necessary."[2] In accordance with that recommendation a committee of the House was appointed and reported a bill which was finally postponed, but became the foundation of the act that was adopted in 1801.[3] It should be stated, however, that this original bill was evidently to a great extent a party measure, for one of the members of the House of Representatives naively remarked, in opposition to a motion to postpone its further consideration, that "the close of the present Executive's authority was at hand, and, from his experience, he was more capable to choose suitable persons to fill the offices than another."[4] Yet the mere fact that the necessity of some such measure had been insisted upon and that at least one bill, strikingly similar in its provisions, had been introduced in the House of Representatives is proof positive that the change and enlargement of the judicial system as established by the Act of 1801 were not to be attributed solely to the recent Federalist defeat.

In the second place, there were not as many judgeships created by this act as is always asserted. Previous to 1801 there had been seventeen districts, in each of which was a court presided over by a district judge.[5] The judiciary act of 1801 established twenty-two such districts, adding five new ones to those already in existence. But this did not mean, as has been taken for granted by practically every writer on this subject, that positions were thereby created for five new judges. Of the five additional courts four were created simply by the division of old districts, that is to say, the states of New York, Pennsylvania, Virginia and Tennessee, each of which had formerly constituted a single district, were now divided into two districts, and no provision whatever was made for the appointment of new judges. It may safely be assumed, therefore, that the district judge in each of these states was to hold court in both districts, and if any doubt exists as to the correctness of this assumption, it must be removed at once by the fact that neither

[1] Act of March 2, 1793.

[2] *Annals of Congress*, 6th Congress, 188, 189.

[3] *Ibid.*, 7th Congress, first session, 672.

[4] *Ibid.*, 6th Congress, 648.

[5] Acts of September 24, 1789, June 4, 1790, June 23, 1790, March 2, 1791, and January 31, 1797.

Adams nor Jefferson ever appointed any judges for these new districts that were thus established. The fifth of the new districts was made up of the territories of Ohio and Indiana, where territorial courts with extensive jurisdiction were already established,[1] and again no provision was made for a district judgeship, nor was any such judge ever appointed. It is evident, then, that this new arrangement of districts was merely one of convenience and did not involve any increase in the number of judges.

As already stated, the principal feature of the act of 1801 was the reorganization of the circuit courts. Until the passage of this act, fourteen of the seventeen districts—the districts of Maine, Kentucky and Tennessee not being included—had been grouped into three circuits, Eastern, Middle and Southern, in which circuit courts were held, originally by two justices of the Supreme Court, but after 1793 by one such justice, and the district judge of the district in which the court sat.[2] By the act of 1801 all of the twenty-two districts were "classed into six circuits," and instead of the Supreme Court justices being detailed to hold circuit courts, distinct judges, known as circuit judges, were to be appointed for this purpose. Three such judges were assigned to each of the first five circuits. To the sixth circuit, which comprised the states of Kentucky and Tennessee and the territories of Ohio and Indiana, only one circuit judge was assigned, who was to hold court with the district judges of the two states included. It was provided that whenever the office of district judge should become vacant in Kentucky and Tennessee, the vacancy should be supplied by the appointment of a circuit judge, but this did not involve the immediate filling of any new positions, for district courts had been established, and district judges had been appointed thereto, at the time of the admission of these states into the Union.

The new judicial appointments, therefore, that were placed in Adams's hands by the act of 1801 were to these circuit judgeships alone, sixteen in all,—no small number, to be sure, but considerably less than is usually asserted.[3] It is true, that in each of the five new districts an attorney and a marshal of the United States were

[1] By act of March 3, 1805, the territorial superior courts were given the jurisdiction of the federal circuit and district courts, with appeals to the Supreme Court of the United States.

[2] Same acts as in note 5, on p. 683.

[3] The correctness of this statement is rendered absolutely certain by a comparison of the amounts apportioned to the judiciary in the appropriation acts of 1800 and 1801, the increased appropriation of the latter year corresponding exactly to the salaries of these judges, with the increase in salary of five of the district judges, and the salaries of the judges of the District of Columbia, in which a circuit court was established at this session of Congress.

to be appointed, but if one may judge from the official reports of the department and the memoirs of some of the officers,[1] the positions were not very lucrative except, possibly, in some of the more important districts; and they certainly are not included in the assertions which this article is criticizing, and may consequently be disregarded in this connection.

Furthermore, the increased expense of this new establishment, over which such a cry was raised by the Republicans in their demand for economy, a cry which has been taken up by some of their more recent followers, was not enormously great. The salaries of the new judges to be appointed under this act amounted to $31,500.[2] Allowing $15,000 for contingent expenses, the total increased cost of the system erected by this act was less than $50,000, a very different thing from $137,000, which it was assumed in 1802 in the debates in Congress that the repeal of the act would save the government.[3]

In the last place, there is a general disagreement among historians, and all seem to be equally in error, as to Adams's appointment of members of Congress to positions under this act. As the Constitution provides that "no Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time,"[4] it was out of the question for Adams to appoint any members of Congress as circuit judges, but it is maintained that the President violated the spirit of the Constitution by advancing district judges to the new positions and then filling the vacancies thus made with senators and representatives. One writer mentions two such appointments,[5] another says that there were "many;"[6] as a matter of fact, there were four.[7] Of the sixteen circuit judges appointed, six were promoted from the position of district judge, and to the vacant district judgeships thereby created three senators and one representative were named.[8]

[1] *American State Papers, Miscellaneous*, I. 303; *cf.* J. H. Morison, *Life of Jeremiah Smith* (district attorney for New Hampshire), Boston, 1845.

[2] In the first five circuits the salary of the judges was fixed at $2,000, in the sixth circuit at $1,500.

[3] *Annals of Congress*, 7th Congress, first session, 37.

[4] Article I., Section 4.

[5] McMaster, *History of the People of the United States*, II. 610, note.

[6] Channing, *The United States of America*, p. 158.

[7] Two members of the House of Representatives, Otis of Massachusetts and Kittera of Pennsylvania, were also appointed to the places of two district attorneys, who received appointments as judges.

[8] Senators Green, Paine and Read, and Representative Hill were respectively named for the district judgeships of Rhode Island, Vermont, South Carolina and North Carolina.

As was stated at the outset, this article is not intended as a vindication of President Adams and the Federalist party for the passage of the Judiciary Act of 1801, nor of the appointments to office that were made under it; its purpose is simply to correct some of the mistaken notions that are current regarding those measures, and to refute some of the charges that have been made. It is not true that the bill was only "introduced after Mr. Adams's defeat for re-election in 1800,"[1] for the act of 1801 was merely a copy of the bill which was introduced at the previous session before that presidential election had been held. The act did not "erect thirty-six new judgeships"[2] nor even add "twenty-three well paid places to the list of offices within the President's gift,"[3] for, as we have seen, aside from the clerks, attorneys and marshals, there were but sixteen judicial offices established. Nor can the increased expense entailed, amounting to less than $50,000, be fairly regarded as "prodigal" or a "serious inconvenience"[4] to a government whose annual income amounted to over ten millions. And finally, as to the appointments that were made, it would seem to be a wholly natural proceeding to promote some of the district judges to the higher positions that were opened, and it would depend solely upon the character of the men themselves, whether it were right that members of Congress should be appointed to the district judgeships thus vacated; it is, therefore, apt to give a wrong impression to say that the Constitution was "*evaded* by promoting *many* district judges to the new positions, and filling the vacancies thus created by the appointment of members of Congress."[5]

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[1] Tyler, *Parties and Patronage*, p. 24.
[2] *Ibid.*
[3] McMaster, *op. cit.*, p. 533.
[4] *Annals of Congress*, 7th Congress, first session, pp. 27, 30.
[5] Channing, *Students' History of the United States*, p 314.